

**IN THE COURT OF CRIMINAL APPEALS OF THE  
STATE OF TEXAS**

**NO. PD-0254-18**

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**CRAIG DOYAL,**  
**Appellee,**

**VS.**

**THE STATE OF TEXAS**

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**ON DISCRETIONARY REVIEW FROM THE NINTH  
COURT OF APPEALS DISTRICT OF THE STATE OF TEXAS**

**CAUSE NO. 09-17-00123-CR**

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***APPELLEE'S BRIEF ON THE MERITS  
FOR APPELLEE'S PETITION FOR DISCRETIONARY REVIEW***

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221<sup>st</sup> Judicial District, Montgomery County

***Ninth Court of Appeals Panel of Justices:***

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**HON. LEANNE JOHNSON, JUSTICE**

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## **Quasi-Statutory Materials Referenced**

Act of May 22, 2007, 80th Leg., R.S. ch. 164, § 1, 2007 Tex. Gen. And Spec. Laws 222 (West). ....	6
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## Secondary Materials Referenced

AMERICAN LAW CENTER FOR LAW AND JUSTICE AMICUS BRIEF, 2014 WL 4804052 (Sept. 22, 2014). . . . .	20
Carl A. Auerbach, <i>Legislative Facts in Grutter v. Bollinger</i> , 45 SAN DIEGO L. REV. 33 (Feb.–March 2008). . . . .	4
Caitlin E. Borgmann, <i>Appellate Review of Social Facts in Constitutional Rights Cases</i> , 101 CAL. L. REV. 1185 (Oct. 2013). . . . .	4
LEWIS CARROLL, ALICE’S ADVENTURES IN WONDERLAND, <i>available at</i> <a href="https://www.cs.cmu.edu/~rgs/alice-XII.html">https://www.cs.cmu.edu/~rgs/alice-XII.html</a> . . . . .	49
LEWIS CARROLL, THROUGH THE LOOKING GLASS (1934).. . . .	43
Steven Alan Childress, <i>Constitutional Fact and Process: A First Amendment Model of Censorial Discretion</i> , 70 TUL. L. REV. 1229, 1241 (1996). . . . .	4
KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE (2d ed. 1979). . . . .	2
Carlos Doroteo, <i>The Texas Open Meetings Act: An Old Fashioned, Wild West, First Amendment Shoot Out</i> , 56 S. TEX. L. REV. 675 (2015). . . . .	35,45
C. Robert Heath & Emily Willms Rogers, <i>Did the Attorney General Shine Light on the Confusion in Texas’ Sunshine Law? Interpreting Open Meetings Act Provision § 551.143</i> , 7 TEX. TECH. ADMIN. L.J. 97 (2006). . . . .	35,44
Scott Houston, <i>Texas Open Meetings Act: Constitutional?</i> 13 TEX. TECH. ADMIN. L.J. 79 (2011). . . . .	35,44
Sam Kinch, Jr., <i>Sharpstown Stock Fraud Scandal</i> , HANDBOOK OF TEXAS ONLINE (June 15, 2010) <a href="http://www.tshaonline.org/handbook/online/articles/mqs01">http://www.tshaonline.org/handbook/online/articles/mqs01</a> . . . . .	45
Steven R. Morrison, <i>Conspiracy Law’s Threat to Free Speech</i> , 15 U. PA. J. CONST. L. 865 (2013). . . . .	18

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Eugene Volokh, <i>Crime Facilitating Speech</i> , 57 STAN. L. REV. 1095 (2005). . . .	18

## STATEMENT OF THE CASE

What this case is *not*:

- this case is not a take-down of the entire Texas Open Meetings Act (TOMA);
- this case is not about discussions of public matters in a quorum, which is covered by Section 551.144; and
- this case is not about shutting out the public and the press from the political process.

This case is a facial constitutional challenge to a single statute of TOMA, Section 551.143, based on overbreadth and vagueness. This case is about giving members of governing bodies the same right of Free Speech that everyone else in this country enjoys. This case is about recognizing that *one section* of seventy-seven sections of an entire chapter of the Texas Government Code unconstitutionally restricts Free Speech. Appellee Craig Doyal is not asking this Court to strike down an entire Act of the Legislature. Appellee is asking this Court to restore the right of public servants to speak freely, and to replace witch hunts with good government.

Appellee Doyal's case began when a specially appointed prosecutor indicted Appellee, the county judge for Montgomery County, along with county commissioners, Charlie Riley and Jim Clark, and political consultant Marc Davenport, for the offense of "knowingly conspir[ing] to circumvent Title 5 Subtitle

A Chapter 551 of the Texas Government Code (hereinafter referred to as the Texas Open Meetings Act), by meeting in a number less than a quorum for the purpose of secret deliberations in violation of the Texas Open Meetings Act, to-wit: by engaging in a verbal exchange concerning an issue within the jurisdiction of the Montgomery County Commissioners Court, namely, the contents of the potential structure of a November 2015 Montgomery County Road Bond” (C.R. 6).<sup>1</sup>

Judge Doyal filed a pretrial motion to dismiss the indictment, arguing that § 551.143: (1) placed unconstitutional burdens on Free Speech and failed to withstand strict scrutiny; (2) was unconstitutionally overbroad; and (3) vague and ambiguous. (C.R. 45). The trial judge held a four-day hearing to determine whether § 551.143 of TOMA was facially unconstitutional. He heard from witnesses for both the defense and the State and, after considering the arguments of counsel and the testimony of eight witnesses, including experts, the trial judge signed an order granting the motion to dismiss (C.R. 79). The Ninth Court of Appeals issued its opinion, reversed the order of the trial court dismissing the indictments, and remanded the case for further proceedings in *State v. Doyal*, No. 09-17-00123-CR, 2018WL761011 (Tex. App.—Beaumont, February 7, 2018).

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<sup>1</sup> The Appellee will cite to the clerk’s record as C.R. The reporter’s record will be cited as 1 R.R., *et seq.*

## **ISSUES PRESENTED**

- I. Whether Section 551.143 of the Texas Government Code is unconstitutionally overbroad**
  - A. Is Section 551.143 a restriction on speech?**
  - B. Is Section 551.143 a content-based restriction on speech?**
  - C. Does Section 551.143 survive strict scrutiny?**
    - 1. What legitimate government interest does Section 551.143 serve?**
    - 2. Is Section 551.143 necessary to serve a legitimate government interest?**
    - 3. Is Section 551.143 narrowly tailored?**
  - D. If Section 551.143 is not subject to strict scrutiny, is it still overbroad under lower standards of scrutiny?**
- II. Whether Section 551.143 is void for vagueness**
  - A. Is the meaning of Section 551.143 ambiguous?**
  - B. Does leaving the determination of what is meant by Section 551.143 to the courts violate separation of powers?**
  - C. Does Section 551.143's lack of notice violate Due Process?**

## STATEMENT OF FACTS

Montgomery County citizens wanted relief from traffic congestion, but after local Tea Party organizations defeated the May 2015 road bond package, Commissioners Court was loathe to even discuss the topic. By that August, representatives of the Texas Patriots PAC realized that the county's traffic problems had reached a crisis, and they requested a meeting with County Judge Doyal. Facilitated by Marc Davenport, Judge Doyal and Commissioner Charlie Riley met with the PAC, and afterwards Judge Doyal held a press conference announcing that there would be a special Commissioners Court meeting the following Tuesday and that he would place on the agenda for discussion—by the public and the commissioners—whether a proposed revised bond package would be included on the November ballot. After public comment and deliberation by the commissioners at the August 22, 2015 open meeting, the Commissioners Court voted unanimously to put the revised road bond package on the November 2015 ballot. The compromise was a success, and the Montgomery County voters passed the new road bond by 60%, whereas the May proposal had failed by 60%.<sup>2</sup> Instead of being lauded for listening to voices in the Montgomery County community, Doyal, Riley, and Davenport were served with criminal indictments.

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<sup>2</sup> For a more complete recounting of the Montgomery County road bond saga, *See* APPENDIX 3 to Doyal's PDR, Defendant Doyal's Motion to Dismiss the Indictment, pp.3-6.

## **SUMMARY OF THE ARGUMENT**

Section 551.143 of the Texas Government Code is facially unconstitutional based on First Amendment overbreadth and the void-for-vagueness doctrine.

Section 551.143 is overbroad because it is a content-based speech restriction on members of governmental bodies that does not pass strict scrutiny. The statute does not pass strict scrutiny because it is not necessary to serve a compelling government interest and it is not narrowly tailored.

Section 551.143 is void for vagueness because the language of the statute conflicts with definitions in earlier parts of the Texas Open Meetings Act. It is impossible to reconcile the meaning of statute based on the plain language of the statute. The statute violates due process because it does not give ordinary citizens notice of the speech it intends to restrict. The statute violates separation of powers because it requires the judicial branch to usurp the role of the legislative branch and fill in the meaning of the statute which is not discernible from the plain language.

**I. SECTION 551.143 IS A CONTENT-BASED RESTRICTION ON SPEECH, THAT IS (1) PRESUMED UNCONSTITUTIONAL AND (2) SUBJECT TO STRICT SCRUTINY.**

The court of appeals misconstrued the meaning and function of Section 551.143 of the Texas Government Code. Setting off from the wrong starting point, the court of appeals applied the wrong standard of scrutiny and erroneously concluded that Section 551.143 is reasonably related to the State's legitimate interest in transparency in public proceedings. The reasoning of the Ninth Court of Appeals does not comport with the First Amendment jurisprudence from either this Court or the United States Supreme Court.

**A. *Standard of review for overbreadth***

Challenging whether a statute is facially unconstitutional is a question of law that this Court should review *de novo*. *Ex parte Lo*, 424 S.W.3d 10, 14 (Tex. Crim. App. 2013). And that is where the agreement on the standard of review ends.

The trial judge heard four days of testimony from public officials and experts who gave real life examples of how public officials regularly suppressed their own speech because of confusion surrounding the statute and for fear of being prosecuted. This testimony supported Doyal's assertion that Section 551.143 operates as a content-based restriction on speech.

The trial judge properly applied a strict scrutiny analysis to Section 551.143 and concluded that it was not a narrowly tailored statute necessary to serve a

compelling government interest. We urge this Court to apply the same strict scrutiny standard of review.

Even if this Court should decide that a lower standard applies, Section 551.143 would still be unconstitutionally overbroad. Under “intermediate scrutiny,” Section 551.143 is not narrowly tailored to serve a significant government interest. Under “rational basis” analysis, Section 551.143 is not sufficiently narrow to advance a substantial government interest. Section 551.143 simply sweeps up too much innocent speech to be considered narrowly tailored under any standard of review. As for the government interest the State claims Section 551.143 advances, (1) no evidence shows that the statute actually does what the State claims, and (2) other sections of TOMA sufficiently ensure that the public is part of the government decision-making process.

**1. This Court should consider the evidence presented to the trial court during the hearing on the motion to dismiss.**

Facts matter. Judges frequently use social, economic, cultural and legal “legislative facts” in deciding the facial constitutionality of statutes. “Adjudicative facts” answer the questions of who did what, where, when, how, why, with what motive or intent; they are the individual facts that a jury decides. “Legislative facts” are “the kind of facts which help the tribunal decide questions of law and policy and discretion.” KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 12.3, at 413

(2d ed. 1979). “Legislative facts” are the background medical, social, cultural, legal, economic facts and data upon which the constitutionality of a specific law is measured.

In *Citizens United v. Federal Election Commission*, the very case that the State relies so heavily upon, the Supreme Court noted that “inquiry into the facial validity of the statute was facilitated by the extensive record, which was ‘over 100,000 pages long, made in the three-judge District Court.’” 558 U.S. 310, 331-32 (2010) (quoting *McConnell v. Fed. Election Comm’n*, 251 F.Supp.2d 176, 209 (D. D.C. 2003)). *Citizens United* observed the lower court’s analysis of “legislative facts,” which included the testimony of over 200 fact and expert witnesses, was integral to the reasoning of the Court in *McConnell v. Fed. Election Comm’n*, 540 U.S. 93 (2003).

Similarly, in *Rangra v. Brown*, the predecessor case to *Asgeirsson* that the State also relies heavily on, the facial constitutionality of Section 551.144 of TOMA was addressed in the context of the testimony of numerous public officials at a bench trial. No. P-05-CV-075, 2006 WL 3327634 (W.D. Tex. Nov. 7, 2006).

Indeed, from *Muller v. Oregon*, 208 U.S. 412 (1908) (the original “Brandeis Brief” setting out vast social science research on the legal issue of the debilitating effects of long work hours on women in deciding the constitutionality of a labor statute) and *Brown v. Board of Education*, 347 U.S. 483 (1954), through today and

the gay marriage cases, *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015),<sup>3</sup> courts have routinely relied upon social, medical, and economic evidence presented through fact and expert witnesses in determining the facial constitutionality of statutes.

Facts do matter in constitutional adjudication. *See generally*, Caitlin E. Borgmann, *Appellate Review of Social Facts in Constitutional Rights Cases*, 101 CAL. L. REV. 1185 (Oct. 2013); Carl A. Auerbach, *Legislative Facts in Grutter v. Bollinger*, 45 SAN DIEGO L. REV. 33 (Feb.–March 2008); Steven Alan Childress, *Constitutional Fact and Process: A First Amendment Model of Censorial Discretion*, 70 TUL. L. REV. 1229, 1241 (1996) (arguing that free speech interests justify applying a constitutional fact, as opposed to a clear-error, standard of review to First Amendment cases).

This Court, like the trial court, may reasonably rely upon the testimony of the Defendant’s lay and expert witnesses in deciding the constitutionality of Section 551.143.

## **2. What exactly does Section 551.143 prohibit?**

To determine the proper standard under which Section 551.143 should be reviewed, we must first decide what the Legislature was trying to regulate with

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<sup>3</sup> *See also Perry v. Schwarzenegger*, 704 F.Supp.2d 921, 938-46 (N.D. Cal. 2010) (listing by the court of the plaintiffs’ eight lay witnesses and nine expert witnesses, their backgrounds, credentials, and testimony concerning gay marriage in a lawsuit attacking the facial constitutionality of Proposition 8 barring gay marriage in California).

Section 551.143. The State would have this Court believe that this statute is merely a disclosure statute. The Ninth Court of Appeals determined that Section 551.143 regulates conduct. Neither is correct. This statute restricts speech, constitutionally protected speech.

**a.     *Section 551.143 is a restriction on the speech of public officials.***

Section 551.143(a) states:

A member or group of members of a governmental body commits an offense if the member or group of members knowingly conspires to circumvent this chapter by meeting in numbers less than a quorum for the purpose of secret deliberations in violation of this chapter.

The purpose of Section 551.143 is to restrict members of governmental bodies from discussing matters of public business in numbers less than a quorum. This is an overly broad restriction on a public official's right to free speech because it gobbles up a huge chunk of innocent and protected speech within its jaws.

Section 551.144 by contrast restricts speech of public official in a more narrowly tailored manner. Section 551.144(a) states:

(a) A member of a governmental body commits an offense if a closed meeting is not permitted under this chapter and the member knowingly:

- (1) calls or aids in calling or organizing the closed meeting, whether it is a special or called closed meeting;
- (2) closes or aids in closing the meeting to the public, if it is a regular meeting; or

(3) participates in the closed meeting, whether it is a regular, special, or called meeting.

Section 551.144 restricts public officials from speaking about matters of public business when they are in numbers constituting a quorum because binding decisions can be made when officials are in a quorum and the public should have access to decision-making. However, Section 551.001(4) defines specific instances when a meeting of a quorum is not a closed meeting subject to Section 551.144 criminal penalty.<sup>4</sup> There are no such clarifying exceptions for Section 551.143.

Section 551.143 operates as an unconstitutional restriction on speech because

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<sup>4</sup> The definition of “meeting” is qualified this way: “The term does not include the gathering of a quorum of a governmental body at a social function unrelated to the public business that is conducted by the body, or the attendance by a quorum of a governmental body at a regional, state, or national convention or workshop, ceremonial event, or press conference, if formal action is not taken and any discussion of public business is incidental to the social function, convention, workshop, ceremonial event, or press conference.” TEX. GOV’T CODE § 551.001(4) (delineating what a “meeting” under TOMA is *not*). The exceptions to what is a “meeting” under TOMA keep growing. In May of 2007 the Legislature added “press conferences” to the list of exceptions. Act of May 22, 2007, 80th Leg., R.S. ch. 164, § 1, 2007 Tex. Gen. And Spec. Laws 222, 222 (West) (to be codified at Tex. Gov’t Code § 551.001(4)). As recently as the 2017 Legislative session, “candidate forum[s], appearance[s], or debate[s] to inform the electorate” were added to the list of exceptions. Act of June 15, 2017, 85th Leg., R.S. ch. 917, § 1, 2017 Tex. Sess. Law Serv. (West) (to be codified at Tex. Gov’t Code § 551.001(4)). In the Bill Analysis by the Senate Committee on Business and Commerce, the authors of the bill acknowledge the confusion felt by many public officials regarding meeting in a quorum: “Concerned parties note that uncertainty exists regarding whether elected officials from the same governmental body can attend a candidate forum or public debate without constituting a quorum under the open meetings act. As a result, some municipalities have recommended that their elected officials avoid participating in such forums in order to adhere to a strict interpretation of the law. This strict interpretation presents a particular burden for smaller communities where city council members are elected at large and all incumbent officials are expected to participate in a single debate. Such a conflict does not represent the best interest of the voting public and reduces access to information about the candidates and their views on policy.” Senate Comm. on Business & Commerce, Bill Analysis, Tex. S.B. 1440, 85th Leg., R.S. (2017) *available at* <https://lrl.texas.gov/scanned/srcBillAnalyses/85-0/SB1440ENR.PDF>. That confusion is even greater when public officials meet in numbers less than a quorum!

it essentially prevents public officials from speaking to each other about matters of public business in numbers less than a quorum. The State has claimed that public officials are only restricted when they *knowingly* conspire to circumvent TOMA, but the confusion surrounding the meaning of Section 551.143 has resulted in public officials not *knowing* what exactly is prohibited by the statute.

At the motion hearing, witnesses expressed a number of concerns about Section 551.143:

- Who does it apply to? Just members of the government entity? Citizens acting with members? The statute begins with the phrase “A member or members”—does that mean one member can conspire all by himself? Or with only one member and then some citizens? Or lobbyists? The city manager? The mayor? (2 R.R. 43)
- Does Section 551.143 apply when three city council members running for re-election all attend the same political house party and talk about “public business”?<sup>5</sup> What if the first two leave, but the third arrival gets a summary of what was said? (2 R.R. 64)
- Suppose a commissioner blogs about public policy—other members who read that blog might be influenced; could the blogger be deemed to have violated Section 551.143? And what if the other commissioners should post a comment on the blog? “God help them.” (3 R.R. 33-34).
- As Ms. Riggs noted, “The very act of trying to keep it legal could be what helps prove, under [Section 551.143] a conspiracy.” (3 R.R. 47). “You can do an awful lot with [Section 551.143] in

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<sup>5</sup> See OP. TEX. ATT’Y GEN., No. JC-0203 (2000) (if two members of a subcommittee appear at an official “speaking engagement” and participate in a discussion of “public business,” TOMA applies).

hindsight to make things look like a violation, totally innocent communications.” (3 R.R. 49).<sup>6</sup>

The practical result under Section 551.143 is that more and more government is actually conducted by staff members, city managers, and the board’s executive director (2 R.R. 76). They are the keepers of information and, unlike elected or appointed officials, they may discuss public business with each other and the citizenry without concern for TOMA if they share that information with the responsible public officials only in an open meeting.

As the mayors testified at the hearing, Section 551.143 scares them:

- Mayor Charles Jessup of Meadows Place said that Section 551.143 is a “very convoluted and confusing statute. . . I really don’t understand it. . . . We try to avoid conversations, and the discussion of a walking quorum has come up, We’re not sure exactly how that works, but it scares us all to death.” (2 R.R. 222).
- He admitted that he had “been in a position this week three times alone of possible violation of [TOMA]” and then he explained the innocent circumstances. (2 R.R. 227).
- Eric Scott, the mayor of Brookshire, testified that he had attended the Kennedy School of Government at Harvard, and he thinks that Section 551.143 “actually stopped good governance” because we can’t have a “free flow of communication and exchange of ideas”

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<sup>6</sup> Charlie Zech, another lawyer who advises public entities and boards, explained how members are in jeopardy if two of them want to have a talk about a public matter. They meet in a quiet room so that a third member won’t join them and create a prohibited quorum. They are intentionally avoiding the Act, but is that in fact a “conspiracy to circumvent” the Act, even though it is perfectly innocent (4 R.R. 85). Is the attempt to comply with the law by avoiding meetings in which a quorum would be present, in fact, evidence of “circumventing” the law and therefore of violating it?

with his fellow council members or citizens. (2 R.R. 263-264).

- Section 551.143 “makes me believe that they can go to jail very easily, and no one wants to go to jail.” (2 R.R. 266). It “chills” his ability to express himself and solicit others’ opinions (2 R.R. 270).
- Mayor Jim Kuykendall of Oak Ridge North explained that Section 551.143 “basically neuters everybody.” (3 R.R. 111). The city manager puts items on the agenda and gives the city council members information. The members don’t feel that they can talk to each other or members of the public outside of a properly posted open meeting (3 R.R. 114). The law makes him a “figurehead,” because the city manager is the real boss, but she could be in trouble for talking to each member. (3 R.R. 116-117).
- After learning about this case, Mayor Kuykendall is afraid he’s broken the law. He fears just being indicted would be devastating financially (3 R.R. 117).
- Even the State’s witness, former Houston City Councilman James Rodriguez stated that he has never “knowingly” been a part of a “rolling quorum”; he repeatedly used the term “err on the side of caution” because he doesn’t want to be charged with a TOMA crime. (5 R.R. 18, 20, 32, 37, 55).

All of these public officials agreed that, because of their fear of being charged with a crime under Section 551.143, they “erred on the side of caution.” That confusing, vague criminal statute “chilled” their speech. Criminalizing innocuous, fact-finding discussions and inquiries by public officials leads to anemic government. This law discourages not only discussion between public officials, but between public

officials and members of the public because that citizen might then talk individually to a quorum of the governing body.

**b.     *Section 551.143 is not a disclosure statute.***

The State's characterization of Section 551.143 as a disclosure statute is off-base. Disclosures, as we typically think of them, are revealing of factual information, much like a nutrition label on a can of tuna. The State is advocating disclosure more in the nature of Big Brother's all-seeing eye. If disclosure were truly the nature of this statute then the Legislature would have required disclosure of every person and every source of information the public official consulted before voting on a particular matter of public business.<sup>7</sup>

In fact, the Texas Legislature, like the United States Congress, does require disclosure of campaign contributions, gifts, and lobbyists because the Legislature has

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<sup>7</sup> In its Amicus Brief to the court of appeals, the Attorney General suggests that the Defendants are just raising a lot of silly "unanswered questions [about the statute like] "does 'deliberation' include discussing an item without making any commitments? Does 'circumvent' mean avoid or does it mean violate?" ATT'Y GEN. AMICUS BRIEF at 17. Indeed, these are *essential* questions concerning potential criminal liability in *any* prosecution under Section 551.143. Also, whether "deliberations" are "secret" if they are in public but outside of an open meeting or whether they are "secret" when held only among the public officials are also important distinctions which require clarification. The Defendants and all of their witnesses – the expert witnesses, the testifying public officials, and, by extension, the members of the Texas Municipal League, Texas City Attorneys Association, Texas Association of Counties, Texas Conference of Urban Counties, Texas Association of School Boards, Texas Association of School Administrators, and the Texas Council of School Attorneys, who filed Amicus Briefs in this case – are requesting this Court to either declare Section 551.143 unconstitutional or, at a minimum, thoroughly explain what the words and phrases within that statute mean individually and collectively and how they are supposed to work together. Thousands of officials across the state must deal with this peculiar statute every day and are in jeopardy of criminal prosecution for their public service unless these questions are thoroughly reviewed and clearly answered.

decided that money can influence a public official's decision-making and the public needs to be aware of that influence. But many factors influence a public official's decision-making—not merely open meeting debates—and the Legislature has not required public officials to disclose them all, including all non-quorum discussions.

Section 551.143 criminalizes speech as soon as it is uttered; it is a ban on speech. A disclosure statute merely requires the speaker (or a third party) to subsequently disclose the speech or the fact of such speech. The two statutory provisions at issue in *Citizens United* prove this very point by applying strict scrutiny and striking down a ban on political speech in one section of the BRCA (Bipartisan Campaign Reform Act) law, while upholding the constitutionality of another provision which simply required disclosure of who had paid for a previously recorded political speech.

In *Citizens United*, the non-profit corporation sought to air and advertise a film critical of Hillary Clinton shortly before the 2008 Democratic primary election. 558 U.S. at 319-20. Federal law, however, prohibited any corporation (or labor union) from making an “electioneering communication” (defined as a broadcast ad reaching over 50,000 people in the electorate within 30 days of a primary or 60 days of an election) or making any expenditure advocating the election or defeat of a candidate

at any time. *Id.* The court found that these two provisions of the law burdened a corporation's political speech, were therefore subject to strict scrutiny, and violated the First Amendment. *Id.* at 340, 372. After all, First Amendment standards "must give the benefit of any doubt to protecting rather than stifling speech." *Id.* at 327 (internal quotation marks omitted).

Under the BCRA, corporations were prohibited from making any "electioneering communication" during a particular time frame (30 or 60 days before the primary or election) and that "time" ban (like a "time" ban upon public officials under TOMA to speak about public business with fellow public officials outside of an open meeting) violated a corporation's First Amendment rights. *Id.* at 372. That statute was not a mere disclosure law because the law was violated at the moment the corporation spoke, either when it made any electioneering communication within the banned time frame or whenever it spent money on "banned" content-advocating for the election or defeat of a particular candidate. *Id.* As Justice Kennedy explained, "If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech." *Id.* at 350.

However, the *Citizens United* Court upheld requirements for public disclosure by the corporate sponsors of advertisements. Those disclosures and disclaimers did

not limit any speech or require that speech be made at a certain time or in any particular place, they merely required that sponsors of political broadcast advertisements reveal the source of their funding. *Id.* at 368-69. The speech itself is fully protected and may be made by either individuals or corporations *at any time and place*, but the law may fairly require the speaker (or broadcast advertiser) to identify who is paying for it. *Id.* at 371 (“The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.”). As the *Citizens United* Court explained:

[P]rompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation’s political speech advances the corporation’s interest in making profits, and citizens can see whether elected officials are “in the pocket” of so-called moneyed interests . . . . This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.

*Id.* at 370-71 (*internal citations omitted*).

“Disclosure” statutes are those that require giving notice of a past event. For example, they require disclosure of

- Who paid for the political advertising (*Citizens United*);

- Who signed the referendum petition (*Doe v. Reed*, 561 U.S. 186, 199 (2010));
- Who is self-financing his own political campaign (*David v. Fed. Election Comm'n*, 554 U.S. 724, 744-45 (2008));
- Who were petition circulators and how much were they paid (*Buckley v. ACLF*, 525 U.S. 182, 204-05 (1999));
- Who were members of an organization like the NAACP (*NAACP v. Alabama*, 357 U.S. 449, 458-59 (1958)).

It is worth pointing out that in each of the examples above, it is a fact that is being disclosed, not the discussion surrounding the issue. No substantive conversations are being revealed, only facts related to the event or document.

To draw from the nutrition label analogy again, these disclosures show the protein content of the can of tuna, the ingredients, and the amount of tuna in the can, but it says nothing about the conversations the fisherman had about where or when he caught the fish, his talks with the licensing authority, the negotiations the fisherman had with the canning company, or the counter-protests the fisherman engaged in when dolphin supporters protested at the fishing pier. Would knowing about that fisherman's speech be helpful in making a decision about which can of tuna to buy? Probably. But it would be too burdensome to require every tuna distributor to label the tuna with all of that information or even some of it. Instead, the government has limited the disclosure on cans of tuna to facts that a consumer

might need for health reasons. Similarly, Texas should limit restriction on public officials' speech to the healthy speech restriction contained in Section 551.144.

In Texas, the primary disclosure law regulating public officials is the Public Information Act, Chapter 552 of the Texas Government Code, the very next chapter of the Code after the Open Meetings Act set out in Chapter 551. It is the purpose of that chapter "to grant the people access to information 'so that they may retain control over the instruments they have created' and, to that end, the provisions of the Act are to be liberally construed in favor of the disclosure of government-held information." *Dominguez v. Gilbert*, 48 S.W.3d 789, 792 (Tex. App.—Austin 2001, orig. proceeding).

A hallmark of these federal and state disclosure provisions is that they do not prohibit any communications by or between public officials in reaching decisions about "public business." Instead, they require that the public be granted access to a record of that communication or speech.

In sum, Section 551.143 unconstitutionally criminalizes speech at the moment it is made and tilts the scales against the public officer's free speech rights. Public officers and public employees, like private citizens, have a constitutional right to private speech as well as public speech. *Givhan v. Western Line Consol. School District*, 439 U.S. 410, 415-16 (1979) ("Neither the [First] Amendment itself nor our

decisions indicate that this freedom is lost to the public employee who arranges to communicate privately . . . rather than to spread his views before the public.”). “Private dissemination of information and ideas can be as important to effective self-governance as public speeches. Thus, if the content and circumstances of a private communication are such that the message conveyed would be relevant to the process of self-governance if disseminated to the community, that communication is public concern speech even though it occurred in a private context.” *Azzaro v. County of Allegheny*, 110 F.3d 968, 978 (3d Cir. 1997). Section 551.143 criminalizes that constitutional free-speech right, and it cannot be upheld.

**c.     *Section 551.143 is certainly not conduct.***

The Ninth Court of Appeals characterized § 551.143 as a content-neutral law restricting conduct and applied mere “rational basis” scrutiny. *State v. Doyal*, No. 09-17-00123-CR, 2018WL761011, \*2 (Tex. App.—Beaumont, February 7, 2018). The court rejected *Reed v. Town of Gilbert, Arizona*, 135 S. Ct. 2218 (2015), as controlling authority and instead relied on *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), to conclude that Section 551.143 addressed only conduct and did not deserve any First Amendment protection as speech. *Broadrick* involved the Hatch Act and partisan political conduct of soliciting funds by public employees. But this is not a case about fundraising “conduct.” It is a case in which the law clearly restricts the

content of what members of a governmental body say to one another and when and to whom they may say it. As the Supreme Court explained in *Broadrick*, a facial challenge is particularly appropriate where a statute regulates “only spoken words,” implicates the right of association, or acts as a prior restraint as § 551.143 does. *See* 413 U.S. at 612-13.

The lower court pointed to its own “instructive” decision in *Ex parte Poe* for support of its holding that Doyal’s conduct is subject to “rational basis” analysis rather than strict scrutiny. In *Poe*, the court held that a statute prohibiting the display of a firearm in public was conduct, not speech, and the proscription on displaying a firearm was rationally related to a legitimate government interest in public safety. 491 S.W.3d 348 (Tex. App.—Beaumont 2016). But displaying a firearm in public is simply not analogous to discussing public business in meetings of less than a quorum. The former involves pure conduct, the latter involves pure speech. You can brandish an AK-47 without a word; a “deliberation” under the Open Meetings Act necessarily requires words.

The Ninth Court’s analysis is unworkable, much like the statute itself. How does one conduct the conspiracy of circumventing a law which restricts speech except by speech? If one is trying to avoid violating TOMA is that just obeying the law? Admittedly, there is some interesting scholarship concerning the intersection of

conspiracy and First Amendment law, but public officials shouldn't be required to parse abstruse law review articles to figure out an Open Meetings statute.<sup>8</sup>

Section 551.143 restricts how and when members of governmental bodies speak about matters of public business. Speech is the core of the statute and speech is what is being restricted. The Beaumont court is simply mistaken that § 551.143 targets “not the content of the deliberations [but] the act of knowingly conspiring to engage in deliberations.” Speech is the heart of “deliberations,” and punishing an agreement to deliberate does not magically convert speech into conduct. *See Cohen v. California*, 403 U.S. 15, 18 (1971) (“The only ‘conduct’ which the State sought to punish is the fact of communication.”).

**B. *If Section 551.143 regulates speech, is it content neutral or must we look at content to decide what’s restricted?***

To decide that a member of a government body violated Section 551.143, a prosecutor must look at the content of that member’s speech. The allegations in this offense cannot be proven without looking into what subject was spoken about. A conversation about fly-fishing in Peru does not violate TOMA, even by a quorum of

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<sup>8</sup> *See, i.e.*, Steven R. Morrison, *Conspiracy Law’s Threat to Free Speech*, 15 U. PA. J. CONST. L. 865, 891 (2013) (discussing, among other things, using speech as an overt act to prove a criminal conspiracy and the problems of speech as evidence); Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095, 1185-86 (2005) (“So most speakers of crime-facilitating speech will know that the speech may facilitate crime, but relatively few will clearly intend this. For many speakers, their true mental state will be hard to determine, because their words may be equally consistent with intention to facilitate crime and with mere knowledge. This means that any conclusion about the speaker's purpose will usually just be a guess.”).

members of a governmental body.<sup>9</sup> But if the conversation is about a matter of public business, then that's when Section 551.143's restrictions are triggered.

The Ninth Court of Appeals characterized § 551.143 as a content-neutral law restricting conduct. *Doyal*, 2018WL761011,\*2. The court rejected *Reed v. Town of Gilbert, Arizona*, as controlling authority. The court of appeals also held that the Fifth Circuit's opinion in *Asgeirsson v. Abbott*, 696 F.3d 454 (5th Cir. 2012), a civil case looking at the constitutionality of a different criminal statute in TOMA, § 551.144, was still valid law after *Reed* and provided the proper First Amendment analysis of § 551.143. *Doyal*, 2018WL761011,\*3-4. After relying on *Broadrick* and its own *Poe* case to decide that § 551.143 was not speech but conduct, the court then adopted the "content-neutral" analysis used in *Asgeirsson v. Abbott* to hold that § 551.143 was not unconstitutionally overbroad or vague. *Asgeirsson* is not controlling authority, has been abrogated by multiple Supreme Court decisions, does not use proper intermediate-scrutiny analysis, and analyzes a different criminal statute under TOMA. Reliance on *Asgeirsson* is misplaced.

The *Asgeirsson* decision was based on this reasoning:

A regulation is not content-based, however, merely because the applicability of the regulation depends on the content of the speech. A statute that appears content-based on its face may still

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<sup>9</sup> Of course if "fly-fishing" is subject to the entity's "jurisdiction" or part of the "public business" it would be subject to Section 551.143's bar, but presumably fly-fishing in Peru is not within Montgomery County Commissioners Court jurisdiction or part of its "public business."

be deemed content-neutral if it is justified without regard to the content of its speech.

696 F.3d at 460. The Supreme Court’s *Reed* decision was based on this reasoning:

[T]he crucial first step in the content-neutrality analysis [is] determining whether the law is content neutral on its face. A law that is content based on its face is subject to strict scrutiny regardless of the government’s benign motive, content-neutral justification, or lack of “animus toward the ideas contained” in the regulated speech.

135 S.Ct. at 2228; *see also United States v. Stevens*, 559 U.S. 460 (2010); *Citizens United*, 558 U.S. 310. The court of appeals should have applied *Reed*’s overbreadth analysis; instead it rejected that Supreme Court case merely because it did not discuss *Asgeirsson*. *Doyal*, 2018WL761011, \*4. Of course the Supreme Court did not discuss *Asgeirsson*, it had different fish to fry.<sup>10</sup> The Beaumont court, nonetheless, held that § 551.143 was content-neutral since “[t]he *Asgeirsson* court held that a regulation is not content-based merely because the applicability of the regulation depends on the

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<sup>10</sup> However, the Supreme Court was certainly aware of *Asgeirsson* at the time it decided *Reed*, as the Brief for the losing party, the Town of Gilbert, cited and quoted it several times in its Respondent’s Brief requesting denial of certiorari. Of course, the Supreme Court rejected the town’s position which was explicitly based, in part, on *Asgeirsson*. Brief for Respondent Town of Gilbert, Arizona, in the Supreme Court, 2013 WL 7393653, \*24, 26 (Oct. 21, 2013) (relying on *Asgeirsson* and arguing that it, and some other circuit courts, had held that “A regulation is not content-based, however, merely because the application of the regulation depends on the content of the speech.”); *see also* Amicus Brief filed by the American Law Center for Law and Justice in Support of *Reed*, 2014 WL 4804052, \*15 (Sept. 22, 2014) (noting the legal and logical problems of *Asgeirsson* as well as three other federal cases which had held that laws based on the content of speech were not necessarily content-based laws).

content of the speech.” *Doyal*, 2018WL761011,\*3. That is explicitly contradicted by *Reed*:

[I]t is well established that “[t]he First Amendment’s hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.” Thus, a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter. For example, a law banning the use of sound trucks for political speech—and only political speech—would be a content-based regulation, even if it imposed no limits on the political viewpoints that could be expressed.

135 S. Ct. at 2230 (*internal citations omitted*). The Supreme Court quoted *Reed* and reiterates its core holding this Term in *National Institute of Family & Life Advocates v. Becerra*. No. 16-1140, 2018 WL 3116336, at \*7 (U.S. June 26, 2018).

Section 551.143 restricts the speech of a whole class of speakers, “members of a governmental body,” and an entire subject matter, “an issue within the jurisdiction of the governmental body or any public business.”<sup>11</sup> That means that the statute is a content-based restriction of expression. It is subject to strict scrutiny.

The court of appeals reached the wrong result because it failed to apply the correct “strict scrutiny” standard. It held that Judge Doyal had failed to “prove that

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<sup>11</sup> The Supreme Court warned against restricting the speech of an entire group of speakers in *Citizens United*, and this Court has also recognized that limiting the speech or expression of an entire group did not render a statute content-neutral. *Martinez State*, 323 S.W.3d 493, 505 (Tex. Crim. App. 2010) (“That all gang hand signs, not just those used by the VC street gang, were prohibited does not render that prohibition content-neutral.”).

the statute was unconstitutionally vague and overbroad,” *Doyal*, 2018WL761011,\*5, but, under strict scrutiny, it is the State’s duty to shoulder that burden of proof.

**C. *Because Section 551.143 is a content-based speech restriction, strict scrutiny must be applied.***

When someone attacks the constitutionality of a statute, courts usually begin with the presumption that the statute is valid and that the legislature has not acted unreasonably or arbitrarily. *Ex parte Lo*, 424 S.W.3d at 15. Normally, the burden rests on the person challenging the law to establish its unconstitutionality. *Id.* at 14. But when the State seeks to restrict or punish speech based on its content, that usual presumption is reversed. *Id.*<sup>12</sup> Content-based regulations are presumptively invalid,

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<sup>12</sup> The State argued that the Supreme Court disfavors facial challenges and quotes *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450-51 (2008). That case involved a lawsuit filed immediately after Washington enacted a “modified blanket primary” system in which candidates could express their political party preference on the ballot regardless of whether the party approved of them. The parties filed suit, claiming that this system violated their First Amendment rights of free association because voters would think the candidates were supported by the political party. Unfortunately, they did not wait to see whether voters really were confused. It was all speculation because the law had not yet been applied to any elections. There was no live controversy and no risk yet to either a candidate or a political party.

Here, however, there certainly is a case and controversy and grave risk. County Judge Doyal and Commissioner Riley were charged with committing a crime under Section 551.143 and are positioned, as were John Lo and Ronald Thompson, to mount a pretrial facial challenge to its constitutionality under the First Amendment. *Ex parte Lo*, 424 S.W.3d at 14; *Ex parte Thompson*, 442 S.W.3d 325, 333 (Tex. Crim. App. 2014). A facial challenge to the constitutionality of a criminal statute is *best* made before trial so that the defendant, if he prevails, need not endure the extravagant time, expense, and anxiety that any such criminal trial entails, when the ultimate outcome is a matter of law, not fact. *See Ex parte Perry*, 483 S.W.3d 884, 902 (Tex. Crim. App. 2016) (facial challenge to penal statute on First Amendment grounds may be made and appealed pretrial).

and the State must rebut that presumption. *Id.*<sup>13</sup> Courts apply the “most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content.” *Id.* (quoting *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994)).

Recent Supreme Court decisions uphold restrictions on speech only in very limited circumstances because content-based restrictions are reviewed under strict scrutiny. This Court has also found statutes overly broad when they restrict whole classes of speakers,<sup>14</sup> the statute criminalized activity that was adequately restricted by other penal statutes,<sup>15</sup> or the statute swept up substantially more protected than unprotected activity.<sup>16</sup> Section 551.143 does not meet the requirements of strict

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<sup>13</sup> The State in its brief to the Ninth Court of Appeals mistakenly relied on cases that do not deal with the Free Speech Clause in stating that one who makes a facial challenge to a law “must show ‘that no set of circumstances exists under which [the statute] would be valid’” or that the statute lacks any “plainly legitimate sweep.” Appellee’s Brief to the Ninth Court of Appeals at 22 and 30. Those cases, *United States v. Salerno*, 481 U.S. 739, 745 (1987) (finding that Bail Reform Act which authorized pretrial detention was not facially unconstitutional under the Eighth Amendment), and *Washington v. Glucksberg*, 521 U.S. 702, 740, n. 7 (1997) (holding that Washington’s ban on assisted suicide was rationally related to legitimate government interests), are irrelevant to a discussion of constitutionality under the First Amendment, which has its own jurisprudence and standards. See *Ex parte Perry*, 483 S.W.3d at 902-03 (“Under the First Amendment’s “overbreadth” doctrine, a law may be declared unconstitutional on its face, even if it might have some legitimate applications.”).

<sup>14</sup> *Martinez v. State*, 323 S.W.3d at 505.

<sup>15</sup> *Ex parte Perry*, 483 S.W.3d at 913.

<sup>16</sup> *Ex parte Mitcham*, No. WR-87,738-01, 2018WL847655 (Tex. Crim. App. February 14, 2018) (Newell, J., concurring).

scrutiny because it is not necessary to serve a compelling state interest and it has not been narrowly tailored to serve that state interest.

**1. The restriction must be necessary.**

The court of appeals stated that “[b]efore a statute will be invalidated on its face as overbroad, the overbreadth must be real and substantial when ‘judged in relation to the statute’s plainly legitimate sweep.’” *Doyal*, 2018WL761011 at \*2. But Judge Newell recently reaffirmed the proper test for constitutional overbreadth in *Ex parte Mitcham*:

Overbreadth analysis already allows that a statute that is capable of being applied constitutionally may nevertheless be unconstitutional if it could also be used to criminalize protected speech....Examples of a statute’s plainly legitimate sweep do not tell us how far beyond that legitimate sweep the statute reaches.

2018WL847655 at \*1 (Newell, J., concurring).

When it comes to protected speech, the legitimate sweep must be no broader than the precise grab of the compelling need that gives rise to the statute. “The First Amendment requires that the Government’s chosen restriction on the speech at issue be ‘actually necessary’ to achieve its interest. There must be a direct causal link between the restriction imposed and the injury to be prevented.” *United States v.*

*Alvarez*, 567 U.S. 709, 725 (2012) (*internal citations omitted*). And this Court has explained:

In order to demonstrate that a challenged restriction is narrowly tailored, the government must demonstrate that the restriction “serve[s] a substantial state interest in ‘a direct and effective way.’”

*Faust v. State*, 491 S.W.3d 733, 748 (Tex. Crim. App. 2015).

Section 551.143 has not been shown to directly and effectively increase governmental transparency or prevent closed meetings. There have been no reported previous criminal convictions in Texas in the more than forty years of § 551.143’s existence. If violations of TOMA were so frequent and egregious as to require stiff criminal sanctions, we should have heard of it before. And if this statute served such a compelling governmental need, it would surely apply to the Texas Legislature and the U. S. Senate, but it does not.

The witnesses testifying at the pretrial hearing gave numerous examples of their own or other officials’ innocent discussions with other officials and citizens that would be covered by § 551.143’s broad language. Some of those examples are cited in Judge Doyal’s brief to the Ninth Court of Appeals, DOYAL’S PDR APPENDIX 3, pp.34-36, and many more in Commissioner Riley’s brief, APPELLEE RILEY’S BRIEF TO NINTH COURT OF APPEALS, pp.7-22, and the amici briefs filed with this Court,

TASB, TASA, CSA AMICI CURIAE BRIEF, pp. 8-9, 11; and the TML, TCAA, TAC, AND CUC AMICI CURIAE BRIEF, pp. 4-6.

These members of local governmental bodies are at the mercy of well-meaning but mistaken prosecutors because § 551.143 is so broad. As the Supreme Court warned, “[T]he First Amendment protects against the Government; it does not leave us at the mercy of noblesse oblige. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.” *Stevens*, 559 U.S. at 480.

And TOMA already has a criminal liability statute—§ 551.144—which serves the purpose of transparency and deterring closed meetings. Section 551.143 sweeps up far more protected, innocent speech than actual criminal conduct. As Presiding Judge Keller explained, “With legitimate applications flowing solely, or almost entirely, from conduct proscribed by other statutes, it could be said that the challenged statute has no life of its own.” *Ex parte Perry*, 483 S.W.3d at 913. Section 551.143 has no real life of its own. TOMA has ample remedies for violations: any action taken during an improper meeting is voidable;<sup>17</sup> an aggrieved person may

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<sup>17</sup> § 551.141.

obtain an injunction in a declaratory judgment action;<sup>18</sup> and criminal sanctions may be sought for a “closed meeting” under § 551.144.

The alarm sounded by media proponents in this case is that the public would be shut out of important decision-making by its government. But § 551.144 safeguards TOMA’s goal of open meetings and § 551.143’s overbreadth cannot be justified. The public-spirited citizens who serve their communities in governmental bodies (many of them without pay) should be free to express themselves informally to other members one-on-one or in small groups without fear that they will be swept up in the wide net of § 551.143.<sup>19</sup>

## **2. The restriction must serve a compelling state interest.**

The court of appeals balanced the need for free speech against the purported salutary effects of TOMA and transparency in public meetings; such a balancing act would allow the categorical restriction of speech. *Doyal*, 2018WL761011,\*5. The Supreme Court warned against weighing such public interests against free speech:

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<sup>18</sup> § 551.142.

<sup>19</sup> In its Amicus Brief to the court of appeals, the Attorney General argued that Section 551.143 “does not concern what is said, but only whether it is said in private, away from the voters who need that information to hold their elected officials accountable.” AMICUS BRIEF OF THE ATT’Y GEN., at 3. How ironic, then, that this prosecution involves open-air discussions between Judge Doyal, Commissioner Riley, Marc Davenport (a political consultant), and Tea Party PAC members, those concerned citizens and voters of Montgomery County who had originally voted against the road bond. And, of course, if they were all discussing fly-fishing in Peru, it wouldn’t matter how “secret” their discussions were or how many commissioners were there. This law is punishing public officials who consult with and cooperate with local voters and concerned citizens.

The Government thus proposes that a claim of categorical exclusion should be considered under a simple balancing test: “Whether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs.” As a free-floating test for First Amendment coverage, that sentence is startling and dangerous. The First Amendment’s guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits.

*Stevens*, 559 U.S. at 470 (*internal citations omitted*). The Beaumont court’s categorical balancing is likewise “startling and dangerous.” Their balance *always* favors “transparency” and *never* favors free speech under Section 551.143. But the Supreme Court has held that not even the “serious and deadly problem” of international terrorism can require automatic forfeiture of First Amendment rights. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 44-45 (2010) (Breyer, J., dissenting).

And the State has certainly not advanced a compelling state interest that justifies abrogating the free speech rights of public officials nor are the interests they assert best served by Section 551.143. State interests that have been suggested are accountability to constituents, preventing government fraud and corruption, and promoting the credibility of public officials. While each of these interests is laudable, none rises to the level of overriding First Amendment rights. Each of these interests,

which fall under the umbrella of government transparency, can be enforced through Section 551.144 which prohibits closed meetings.

Government transparency is not even important enough to rate being enforced in every branch of the government and in every instance of government decision-making. For example in the judicial branch, verdicts in criminal trials are required to be read in open court, but the deliberations of the jury who decides the verdict are secret. And decisions made by this Court or the Supreme Court are promulgated in publicly available opinions, but the pre-decision deliberations by judges and justices are “secret” from the public. The written materials submitted to and used by judges or any other public officer are subject to disclosure under the Open Records Act, but not all pre-decision discussions between a non-quorum of public officers are “compelling” enough to be subject to formal public meetings under formal, pre-announced agendas.

The Supreme Court, in *Parents Involved in Community Schools v. Seattle School District No. 1*, held that even when a law serves a compelling government interest by solving a social problem, the solution itself must be lawful. 551 U.S. 701, 797 (2007). In that case, the school district’s admission plan was designed to create diversity in the schools, but to do so required schools to consider the race of the applicants. The Supreme Court struck down the school district’s admission plan as

unconstitutional because the Equal Protection guaranteed by the Constitution could not be abridged even for the compelling interest of diversity in classrooms. In much the same way, the First Amendment rights of public officials cannot be ignored because openness in government is a laudable goal.

### **3. The restriction must be narrowly tailored.**

The Texas Open Meetings Act has the laudable goal of promoting transparency in government meetings. Section 551.144 prohibits closed meetings and imposes penalties for discussions by a quorum of a governmental body about public business without following TOMA requirements. But § 551.143 floods the waterfront by prohibiting members of governing bodies from meeting in numbers of less than a quorum for the purpose of so-called “secret” deliberations “on matters within the jurisdiction of the governing body or public business.” Section 551. 143’s driftnet approach tangles up too much protected speech because it is not narrowly tailored like § 551.144 and does not pass strict scrutiny.

The lower court and the State both fail to explain how Section 551.143 is narrowly tailored to meet the interests of government transparency—other than to claim that Section 551.143 requires members of a government body to refrain from *knowingly* conspiring to circumvent TOMA. But, as discussed *infra* in Part IIB, no one knows what it means to “circumvent” TOMA. Does it mean to intentionally

violate TOMA with ill-purpose or does it include the innocent intent to meet with less than a quorum of members to make sure to *not* violate TOMA? As the State's own witness repeatedly testified, he never met with more than one or two of his fellow council members because he wanted to make sure that he didn't violate Section 551.143 and "it's better to err on the side of caution." (5 R.R. 18, 20, 32, 37, 55).

**D. *Even if strict scrutiny didn't apply, Section 551.143 still fails intermediate and rational basis scrutiny.***

The court of appeals held that § 551.143's overbreadth was not real and substantial when compared to its plainly legitimate sweep and that Judge Doyal did not satisfy his burden to show that the provision was unconstitutionally overbroad. *Doyal*, 2018WL761011,\*5.

Should this Court agree with the State's contention that Section 551.143 is a disclosure statute and entitled to a lower standard of scrutiny, Section 551.143 would fail to meet the United State's Supreme Court's standard for disclosure speech:

Even under *Zauderer*, a disclosure requirement cannot be 'unjustified or unduly burdensome.' Our precedents require disclosures to remedy a harm that is "potentially real not purely hypothetical,' and to extend 'no broader than reasonably necessary,' Otherwise, they risk 'chilling' protected speech." Importantly, California has the burden to prove that the unlicensed notice is neither unjustified nor unduly burdensome. It has not met its burden.

*Family & Life Advocates*, 2018 WL 3116336 at \*14 (*internal citations omitted*).

Importantly, even with disclosure statutes, the Supreme Court still places the burden on the State to prove that the statute is “neither unjustified nor unduly burdensome.”

*Id.*

The potential harm prevented by Section 551.143 after forty years on the books seems more hypothetical than real. Section 551.143 also unduly burdens public officials when speaking in numbers of less than a quorum, because they must constantly look over their shoulders worrying that someone might think they are conspiring to circumvent TOMA. Even if this were a disclosure statute, the State has failed to shoulder the burden of proof required under *Family & Life Advocates*. 2018 WL 3116336 at \*14.

But if Section 551.143 could be classified in some other manner besides disclosure which would render it content-neutral and intermediate scrutiny would apply, two other relatively new Supreme Court cases show that this statute is unconstitutional under that standard also. This law, like those in *Packingham v. North Carolina*, 137 S.Ct. 1730 (2017), and *Matal v. Tam*, 137 S.Ct. 1744 (2017), violates the Free Speech Clause of the First Amendment. To survive intermediate scrutiny, a law must be narrowly tailored to serve a “significant governmental interest.”

*Packingham*, 137 S.Ct. at 1736. That is, “the law must not ‘burden substantially more speech than is necessary to further the government's legitimate interest.’” *Id.*

In *Packingham*, the Supreme Court invalidated a law banning sex offenders from using social media. The Court stated that a “fundamental principle of the First Amendment” was that everyone should “have access to places where they can speak and listen, and then, after reflection, speak and listen once more.” *Id.* at 1732. The Internet is now ubiquitous and courts should “exercise extreme caution before suggesting that the First Amendment provides scant protection for access” to social-networking sites like Facebook and Twitter. *Id.* That law was overly broad because it barred sex offenders from accessing much more than just prurient sexual materials. The State had failed to meet “its burden to show that this sweeping law is necessary or legitimate to serve” the purpose of keeping convicted sex offenders away from vulnerable victims. *Id.* at 1737. The government “may not suppress lawful speech as the means to suppress unlawful speech,” but that was what the North Carolina law did. It swept too broadly. *Id.* at 1738.

Similarly, in *Matal v. Tam*, one of the most important recent free speech cases, the Court held that the First Amendment bars a law prohibiting “disparaging” trademarks. People are free to express ideas that offend others. *Id.* at 1751. First, the argument that trademarks are “government” speech and, therefore, the First

Amendment did not apply was just wrong. The government did not dream up the trademarks, i.e., the speech; it tried to control other people's speech. *Id.* Second, even if the trademarks were commercial speech, the “disparagement” clause was not sufficiently narrow to advance “a substantial interest.” *Id.* at 1764-65. And the disparagement clause sweeps too broadly because it applies to all disparaging trademarks, including those that disparage racists or sexists. “It is not an anti-discrimination clause,” but instead “a happy-talk clause.” *Id.* at 1765.

This past year’s three most important Supreme Court free-speech cases show that even when courts apply intermediate scrutiny, rather than strict scrutiny, the law in question may not be broader than necessary to accomplish the important governmental objective. Section 551.143 does not become any less broad or any less vague under intermediate scrutiny than under strict scrutiny. And, as *Family & Life Advocates* reiterates, the State still shoulders the burden of proof. 2018 WL 3116336, at \*14.

The State argues that, because the Fifth Circuit, in *Asgeirsson*, upheld the constitutionality of Section 551.144 under intermediate scrutiny,<sup>20</sup> this Court should

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<sup>20</sup> But remember that *Reed* contradicts *Asgeirsson*’s reasoning and result, and the Supreme Court had that Fifth Circuit case cited and quoted to them in two of the *Reed* briefs. They were obviously not persuaded by *Asgeirsson* because they concluded the opposite.

uphold the constitutionality of Section 551.143 under that same analysis. The State assumes that all TOMA statutes are fungible: If one is constitutional, all are. Not true.

For example, in *Ex parte Lo*, the Court of Criminal Appeals held that one subsection of the “solicitation of a minor” statute (the “dirty words” section) violated free speech, while heavily hinting that another section (actual solicitation by requesting an illegal sexual act) did pass constitutional muster. 424 S.W.3d at 16-17. The Court compared and contrasted the two different subsections of the same law to show how they differed—one overly broad and vague, the other carefully targeted.

The same is true here. Section 551.144 is simple and clear. It prohibits “closed meetings” deliberations about public business by a quorum of a governmental entity without following TOMA requirements. Section 551.143 has been repeatedly criticized by legislators, lawyers, law review articles, and public officials as confusing, incoherent, and unconstitutional on its face.<sup>21</sup> It is a masterpiece of obfuscation.

No matter what one calls it or how one cuts it, Section 551.143 violates the Free Speech Clause of the First Amendment because it is overly broad and unconstitutionally vague.

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<sup>21</sup> See *infra* note 26.

## **II. Section 551.143 is void for vagueness.**

“The prohibition of vagueness in criminal statutes” is an “essential” of due process, required by both “ordinary notions of fair play and the settled rules of law.” *Johnson v. United States*, 135 S.Ct. 2551, 2557 (2015) (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)). The void-for-vagueness doctrine guarantees that ordinary people will have “fair notice” of the conduct a statute proscribes. *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018). As the Supreme Court most recently explained, “the doctrine is a corollary of the separation of powers—requiring that Congress, rather than the executive or judicial branch, define what conduct is sanctionable and what is not.” *Id.* (quoting *Kolender v. Lawson*, 461 U.S. 352, 358, n. 7855 (“[I]f the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, [it would] substitute the judicial for the legislative department” (internal quotation marks omitted))).

All vaguely worded laws create a trap for the unwary, but § 551.143 creates uniquely steep stakes because the mere indictment of a public official has political, as well as personal, consequences that range from loss of public trust to loss of public office. As a constitutional matter, public officials must be clearly put on notice of precisely what speech they are statutorily prohibited from engaging in because even

the perception of criminal conduct damages both the body politic and the individual person. *Ex parte Perry*, 483 S.W.3d at 898. When a statute burdens First Amendment rights, the vagueness doctrine demands greater specificity than in other contexts to preserve the right of free expression because “[u]ncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked.” *Grayned v. Rockford*, 408 U.S. 104, 109 (1972). In other words, it “chills” free speech.

**A. *Standard of review for vagueness***

According to both U.S. Supreme Court<sup>22</sup> and Texas Court of Criminal Appeals<sup>23</sup> precedent, criminal laws must be sufficiently clear in at least three respects.

- First, a person of ordinary intelligence must have a reasonable opportunity to know what is prohibited. *Long*, 931 S.W.2d at 287.
- Second, the law must establish clear guidelines for law enforcement. *Id.*
- Third, when First Amendment freedoms are implicated, the law must be sufficiently definite to avoid chilling protected expression. *Id.*

The Supreme Court in *Johnson v. United States* explained that a “void for vagueness” challenger is not required to show that the statute has no constitutional

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<sup>22</sup> *Grayned*, 408 U.S. at 108.

<sup>23</sup> *Long v. State*, 931 S.W.2d 285 (Tex. Crim. App. 1996) (provision of harassment statute referring to conduct that was likely to “annoy” or “alarm” was vague and reasonable person standard could not be read into it; entire statute declared unconstitutional under First Amendment).

applications, only that the statute is not sufficiently clear to give notice of the prohibited conduct:

The...supposed requirement of vagueness in all applications is not a requirement at all, but a tautology: If we hold a statute to be vague, it is vague in all its applications (and never mind the reality). If the existence of some clearly unreasonable rates would not save the law in *L. Cohen Grocery*, why should the existence of some clearly risky crimes save the residual clause?

135 S. Ct. at 2561(*internal citations omitted*). Just because the State can think of some instances when public officials might be speaking to each other in a manner that would violate TOMA does not save Section 551.143 from being impermissibly vague. The purpose of the vagueness doctrine is to prevent the government from “chilling substantial amounts of speech and facilitating discriminatory and arbitrary enforcement.” *Asgeirsson*, 696 F.3d at 466. Section 551.143’s enforcement over the forty years it has been enacted has been just such a “discriminatory and arbitrary” statute. Judge Doyal’s case is one of the only prosecutions we’ve been able to find. And it is brought by a “special” prosecutor, not a politically accountable elected official.

**B. *Criminal statutes are held to a higher standard.***

A vague criminal statute that encroaches on free speech violates due process because it fails to give fair warning of what is prohibited, encourages arbitrary and

discriminatory enforcement, and has a chilling effect on free expression. *Grayned*, 408 U.S. at 108-09. “In particular, the Court has ‘expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.’” *Dimaya*, 138 S. Ct. at 1212-13 (quoting *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498–499 (1982)). The Supreme Court in *Sessions v. Dimaya* cautioned against statutory language that devolves into guesswork and intuition and reiterated that, because civil removal cases have consequences almost as severe as criminal prosecutions, “the most exacting vagueness standard should apply[.]” 138 S.Ct. at 1213.

This Court has never addressed the meaning of the statutory language in § 551.143, a criminal law which places thousands of Texas public officials—many of whom serve without recompense—in potential peril of prosecution. The court of appeals’ conclusion that § 551.143 gives adequate notice to the average person is based on reinterpreting the statute, which is in conflict with this Court’s statutory construction principles in *Long v. State*, 931 S.W.2d 285 (Tex. Crim. App. 1996), and *State v. Johnson*, 475 S.W.3d 860 (Tex. Crim. App. 2015), as well as the Supreme Court’s void-for-vagueness body of law in *Grayned v. Rockford*, 408 U.S. 104 (1972), *Kolender v. Lawson*, 461 U.S. 352 (1983), and *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

The court of appeals held that § 551.143 could be understood from the plain words of the statute. The Beaumont court analogized Judge Doyal’s arguments regarding the ambiguity in the meaning of “conspire,” “circumvent,” “secret,” and “deliberations” in the context of § 551.143 to the ambiguity complained of in *Ex parte Poe* and the alleged ambiguity surrounding “alarm” in that case. The court quickly dispensed with “conspire,” “circumvent,” and “secret,” stating that these words all had plain meanings, so there was no ambiguity. *Doyal*, 2018WL761011,\*4.<sup>24</sup> The appeals court then relied on an Attorney General opinion to supply the interpretation of “deliberations.” The court concluded that meeting in numbers less than a quorum was a “method of forming a quorum” and that this was discerned from the plain meaning of the words. *Doyal*, 2018WL761011,\*5.

Section 551.143 is so broadly worded that all members of a governmental body who find themselves in the company of any other members of that same governmental body should be on guard as to what they speak about (or even to speak at all), lest

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<sup>24</sup> If these words in this context are so “plain” and simple, this Court would have no difficulty informing the affected public officials whether the law prohibits *only* the sequential meetings of non-quorums of a governmental entity to eventually reach a quorum; at those meetings the members conspire to intentionally violate the TOMA law; those meetings are held secretly with only the members of the entity in attendance; and involve deciding issues upon which the entity will make a later decision at an open meeting. Or does the statute *also* prohibit any meetings between a member of the public entity and a citizen who may then sequentially discuss the same issue with each and every other member of the entity, while the public official intends to discuss business only with a non-quorum of members to ensure that he does not violate TOMA, and the discussions take place in a public space such as a community pool, and the discussions are preliminary and do not involve a matter that is currently “within the jurisdiction” of the public entity or any other “public business”? Or some situations in between? Public officials in peril need to know.

someone construe that “meeting” as a conspiracy. This is the counsel that experts give their governmental entity clients: “The very act of trying to keep it legal could be what helps prove, under [§ 551.143] a conspiracy.” (3 R.R. 47). “You can do an awful lot with [§ 551.143] in hindsight to make things look like a violation, totally innocent communications.” (3 R.R. 49). Because members of governmental bodies can never know exactly what speech is prohibited and in what numbers it is safe to talk, these members often refrain from speaking altogether.

The Beaumont court’s artificial construction and insertion of language that is not actually in the statute conflicts with well-established Supreme Court precedent: “[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.” *Kolender*, 461 U.S. at 357.

In the context of a vagueness challenge, every word and phrase within the penal statute must be analyzed to determine the clarity of that word and phrase within the context of the entirety. *Dimaya*, 138 S.Ct. at 1213-1223. And only if the individual parts and their placement in the whole scheme can be readily understood by the ordinary person does the penal statute “avoid the guesswork and intuition”

which “produces more unpredictability and arbitrariness than the Due Process Clause allows.” *Id.* at 1223.

Yet multiple witnesses testified that ordinary people serving their communities are confused by § 551.143 and must guess at its meaning. Mayor Charles Jessup of Meadows Place said that § 551.143 is a “very convoluted and confusing statute. . . I really don’t understand it. . . . We try to avoid conversations, and the discussion of a walking quorum has come up. We’re not sure exactly how that works, but it scares us all to death.” (2 R.R. 222). Eric Scott, mayor of Brookshire, testified that § 551.143 “makes me believe that they can go to jail very easily, and no one wants to go to jail.” (2 R.R. 266). It “chills” his ability to express himself and solicit others’ opinions. (2 R.R. 270). Mayor Jim Kuykendall of Oak Ridge North explained that Section 551.143 “basically neuters everybody.” (3 R.R. 111). The members don’t feel that they can talk to each other or members of the public. (3 R.R. 114). After learning about this case, Mayor Kuykendall is afraid he’s broken the law. He fears just being indicted would be devastating financially. (3 R.R. 117).

Section 551.143 is vague on its face by making it a crime for a member of a governmental body to “conspire” to meet in numbers of less than a quorum “to circumvent” TOMA for the purpose of “secret deliberations” about “public business” or “an issue within the jurisdiction of the government body.” The court of appeals

erred when it held that “conspire,” “circumvent,” and “secret” all had plain meanings that required no special judicial interpretation and that “public business” deserved no interpretation at all. The court of appeals treated those words as if there could be no confusion at all. Witnesses at the hearing said otherwise. They are the ones who know the problems of the statute, and they are the ones who need answers.

***C. Although Section 551.143 is ambiguous, legislative history does not support adding “walking quorum” to its interpretation.***

Perhaps most troubling was the intermediate court’s blind adoption of the Attorney General’s opinion on the matter. The Attorney General’s resolution of the conflict in § 551.143, which prohibits public officials in less than a quorum from having “deliberations,” and § 551.001, which defines “deliberations” as a verbal exchange between a quorum, is as follows: “‘meeting in numbers less than a quorum’ describes a method of forming a quorum, and a quorum formed this way may hold deliberations like any other quorum.” TEX. ATT’Y GEN. OP. GA-0326, 4 (2005). How can less than a quorum form a quorum? And if it takes a quorum to deliberate, how can less than a quorum deliberate in violation of TOMA? The Beaumont court merely opined that the Attorney General’s construction of the statute was discernible from

a plain reading of the words. *Doyal*, 2018WL761011,\*5. But those words, strung together, create a Humpty-Dumpty contradiction.<sup>25</sup>

The lower court's analysis also conflicts with this Court's void-for-vagueness analysis in *Long v. State*, 931 S.W.2d 285 (Tex. Crim. App. 1996) and *Wagner v. State*, No. PD-065-15, 2018WL849164 (Tex. Crim. App. Feb. 14, 2018). Both decisions recognize that criminal statutes require greater specificity and "narrow tailoring" in the First Amendment context. And Judge Keasler has specifically cautioned against statutory interpretation such as the Beaumont court engaged in: "I believe a statute is only 'readily subject to a narrowing construction' if the language already in the statute can be construed in a narrow manner. Adding language to a statute is legislating from the bench." *State v. Markovich*, 77 S.W.3d 274, 285 (Tex. Crim. App. 2002) (Keasler, J., dissenting).

From its enactment in 1973, courts, commentators, experts, and (most importantly) public officials who try to obey this criminal law have been confused.<sup>26</sup>

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<sup>25</sup> "'When I use a word,' Humpty-Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean—neither more nor less.'" LEWIS CARROLL, *THROUGH THE LOOKING GLASS*, ch.6, p. 205 (1934).

<sup>26</sup> See generally, C. Robert Heath & Emily Willms Rogers, *Did the Attorney General Shine Light on the Confusion in Texas' Sunshine Law? Interpreting Open Meetings Act Provision § 551.143*, 7 TEX. TECH. ADMIN. L.J. 97, 99 (2006) ("Despite these attempts at clarification" by courts and attorney general opinions "confusion persists, and local officials desiring to steer clear of violating the Act look for a bright-line rule that clearly defines when discussions among members of a governing body outside a formal public meeting are permissible and when they are not."); Scott Houston, *Texas Open Meetings Act: Constitutional?*, 13 TEX. TECH. ADMIN. L.J. 79, 100 (2011) ("Even with vast knowledge of the act [TOMA], practitioners still have trouble advising clients.

So confused, that in 2004 (some thirty years after it had originally been enacted but apparently never used in the criminal context)<sup>27</sup> Tom Maness, the long-time Jefferson County District Attorney, requested an Attorney General opinion about it. He “had significant doubt as to the constitutionality of the statute,” there was “significant disagreement” as to its intended meaning, and he was concerned that it was “void for vagueness.”<sup>28</sup>

The Attorney General basically rewrote the statute to prohibit:

[M]embers of a governmental body who knowingly conspire to gather in numbers that do not physically constitute a quorum at any one time but who through successive gatherings secretly discuss a public matter with a quorum of that body violate section 551.143 of the Open Meetings Act.

OP. TEX. ATT’Y GEN., No. GA-0326, 8 (2005).<sup>29</sup>

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Many elected officials ask if they can talk about public business with other members of the governmental body outside of a properly posted meeting. Generally, the answer is no.”); Carlos Doroteo, *The Texas Open Meetings Act: An Old-Fashioned, Wild-West, First Amendment Shoot-Out*, 56 S. TEX. L. REV. 675, 708 (2015) (“The sheer complexity and confusion arising out of this real world event [the Port of Houston board member fight] provides a strong case that TOMA is overbroad and vague, since it is difficult to discern when exactly the law has been broken.”).

<sup>27</sup> Section 551.143 was added to the original 1967 Open Meetings Act in 1973, after the 1971 Sharpstown stock-fraud scandal. Sam Kinch, Jr., *Sharpstown Stock-Fraud Scandal*, HANDBOOK OF TEXAS ONLINE (June 15, 2010) <http://www.tshaonline.org/handbook/online/articles/mqs01>. In 1993, the Open Meetings Act was codified in chapter 551 of the Texas Government Code.

<sup>28</sup> Req. for Op. Tex. Att’y Gen., No. RQ-0291-GA (2004) <https://texasattorneygeneral.gov/opinions/opinions/50abbott/rq/2004/pdf/RQ0291GA.pdf>.

<sup>29</sup> As one expert witness testified, the only way for Section 551.143 to mean what the AG's opinion says it means is to invent a lot of new words and put them in the statute (2 R.R. 56). But an AG opinion cannot add new words or new definitions to a penal statute, a law that must be strictly

We are told by Attorney General Opinion No. GA-0326 that the purpose of Section 551.143 is to prevent and punish a “walking quorum” or “daisy chain” secret deliberation. *Id.* at 3-4, 5. This occurs, according to the Attorney General, when members conspire to commit a criminal offense by having secret deliberations through serial communications with each other until a quorum is reached. Of course, that is not what the law actually says.<sup>30</sup> The Attorney General simply found that construction “discernible” from his own reading. *Id.* at 4.<sup>31</sup>

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construed and whose provisions are interpreted under the Rule of Lenity to favor the defendant not the State.

It is a “familiar principle that ‘ambiguity’ in the ambit of criminal statutes should be resolved in favor of lenity.” *Skilling v. United States*, 561 U. S. 358, 410 (2010). That principle prevents courts from giving the words of a criminal statute “a meaning that is different from [their] ordinary, accepted meaning, and that disfavors the defendant.” *Burrage v. United States*, 134 S.Ct. 881, 891 (2014). And it means that when a criminal statute has two possible readings, courts do not “‘choose the harsher alternative’” unless the legislature has “‘spoken in language that is clear and definite.’” *United States v. Bass*, 404 U. S. 336, 347-349 (1971).

<sup>30</sup> A Kansas *civil* statute does say what the Attorney General argues that Section 551.143 meant to say. See APPENDIX A of DOYAL’S PDR, Motion to Dismiss, fn. 8.

<sup>31</sup> According to a 1990 Louisiana Attorney General Opinion, “a ‘walking quorum’ is a meeting of a public body where different members leave the meeting and different members enter the meeting so that while an actual quorum is never physically present an actual quorum during the course of the meeting participates in the discussion.” *Mabry v. Union Parish School Board*, 974 So.2d 787, 789 (La. App. 2014) (quoting OP. LA. ATTY. GEN. No. 90-349, July 26, 1990). The *Mabry* court held that the “casual telephone encounters where several board members individually and separately discussed the situation” concerning an employment contract would have “to reach a much more structured level with secretive binding force on at least a quorum of the membership before the Open Meetings Act would be implicated.” *Id.* The court explained:

[W]e find that the informal exchange of ideas and opinions preliminary to a meeting of elected officials is important for the issues of agenda setting and compromise that make a deliberative body function efficiently. For one member to have a phone conversation with another, wherein opinions and thoughts on a topic are expressed, does not mean or create a presumption that those parties’ views will be fixed in stone in solidarity before the public meeting.

But the meaning of Section 551.143 is not discernible from a plain reading of the statute and when a statute is ambiguous, it is permissible to look at context and legislative intent. What is interesting about the legislative history is that when TOMA was first enacted in 1967, Section 551.143 was not contemplated as part of the original Open Meetings Act.

Section 551.143 was not added to TOMA until 1973. When Section 551.143 was being debated on the House floor, Representative Hutchinson offered an amendment which would authorize prosecution of any person who filed a false claim under Section 551.143. The amendment was initially passed by one vote but a vote to table the amendment succeeded and ultimately the Hutchinson amendment did not see the light of day. Representative Truan offered this explanation for his vote in favor of the amendment:

I voted for the Hutchinson amendment to HB 3 because of my concern for those public officials who might be subjected to wilful, malicious, and false accusation by a person who desires to injure their position, character, and reputation.

H.J. of Tex., 63rd Leg., R.S. 250 (January 29, 1973).

Even when Section 551.143 was being deliberated by the Legislature, there were legislators who believed it ran afoul of the First Amendment. Representative Hollowell stated:

I voted “No” on HB 3 because the bill as passed violates both the right of freedom of speech and freedom of assembly of the First Amendment of the United States Constitution made applicable to the states by the 14<sup>th</sup> Amendment of the United States Constitution.

H.J. of Tex., 63rd Leg., R.S. 252 (January 29, 1973).

Representative Cavness stated:

I voted “Present–Not Voting” on HB 3 because I strongly favor open, public meetings any time action is taken on public matters but I feel some of the provisions of HB 3 will be unworkable and unenforceable as they relate to state agencies and to 5-member or 3-member legislative subcommittees who, under the provisions of this bill, could not have informal discussions of pending matters or of regular, say-to-day state agency business without posting notice in advance with the Secretary of State. I offered amendments to clarify such provisions but they were not adopted. I also feel it is unwise to require investigating committees to hear all witnesses in public since much testimony might never be available under such circumstances.

Also I believe this bill, as passed, violates the first amendment of the United States Constitution, made applicable to the states under the 14<sup>th</sup> Amendment.

H.J. of Tex., 63rd Leg., R.S. 252 (January 29, 1973).

The next day as House Bill 3 continued to be debated, Representative Cobb added his voice:

I wish to go on record as favoring open meetings. However, I voted against HB 3 for the following reasons:

1. As it stands, I believe the bill to be unconstitutional on its face.
2. I offered an amendment which would have rendered null and void any action taken in violation of the Act. This would have been in lieu of the penal provisions of the bill to which I object.

H.J. of Tex., 63rd Leg., R.S. 289-90 (January 30, 1973). Clearly, there was concern that Section 551.143 was not constitutionally sound. This Court should heed the voices of the legislators who foresaw the constitutional infirmities within the statute. Section 551.143 is unconstitutional on its face because it leaves public officials “subject[] to wilful, malicious, and false accusation” and the enforcement of the vague language of the statute is arbitrary and invites too much discretion by those who would wield it.

**D. *Criminal statutes aimed specifically at public officials require special clarity because an allegation can result in punishment before a verdict.***

Unfortunately, for public officials, the court of public opinion operates a lot like that of the Queen of Hearts in *Alice in Wonderland*: “Sentence first – verdict afterwards!” LEWIS CARROLL, ALICE’S ADVENTURES IN WONDERLAND, ch.12,

*available at* <https://www.cs.cmu.edu/~rgs/alice-XII.html>. The perception of wrongdoing can be fatal to a public official's career, especially if he or she is elected. This has played out in Judge Doyal's own experience. He has yet to be convicted of violating Section 551.143, but his March primary opponent made sure to send out campaign flyers with jail bars superimposed over a picture of Judge Doyal and taglines encouraging voters to stop the corruption in Montgomery County. Section 551.143 is ripe for misuse by political opponents because the language is vague. Public officials need as much clarity in the statutes that criminally penalize them as the average person, if not more. Will Judge Doyal's successor in office be seeking out or listening to the opinions of others? Certainly not. He will keep his mouth and ears shut, as will all other Montgomery County officials. And thus, Section 551.143 has done its work of chilling speech without even a verdict, much less a sentence.

The trial judge heard numerous witnesses before deciding that § 551.143 was unconstitutionally vague. Not only did he hear testimony from experts on the Open Meetings Act and the First Amendment, but he also heard testimony from various Texas public officials. Those officials admitted they struggled to understand the restrictions imposed by § 551.143, and they were afraid to speak to fellow members about public business and sometimes even feared being seen together because of the

possibility of being accused of trying to circumvent TOMA. (2 R.R. 222, 227, 263-266, 270; 3 R.R. 111, 114, 116-117; 5 R.R. 18, 20, 32, 37, 55).

These public officials shudder in their boots because they can so easily be indicted and beggared by defending themselves in court, regardless of their innocent intent. This concern chills their free speech and deters them from doing their job effectively and efficiently. Unlike Judge Doyal and his fellow public officials who must work with their colleagues in resolving governmental issues as they crop up, Monday morning hindsight gives “prosecutor[s] the ability to pick and choose” (3 R.R. 51), and they “have the power to go out and pick those whose communications they don’t like” under § 551.143 (3 R.R. 61). It was in the context of this evidence from those who must work with TOMA on a daily basis that the trial judge held that § 551.143 is unconstitutionally vague.

“It has been said that the life of the law is experience.” *Johnson v. United States*, 135 S. Ct. 2551, 2560 (2015). The experience of the public officials who live with Section 551.143 every day is that it is unworkable because no one understands what the statute prohibits. Public service should be a privilege not a punishment, but to continue to let Section 551.143 terrorize members of governing bodies is to punish ourselves with anemic government in which it is safer to say nothing than to risk indictment.

## **PRAYER FOR RELIEF**

Section 551.143 of the Texas Government Code is facially unconstitutional because it is overbroad and vague. For all of the reasons set out above, Judge Doyal asks this Court to reverse the judgment of the Ninth Court of Appeals, and reinstate the judgment of the trial court.

Respectfully submitted:

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## **CERTIFICATE OF COMPLIANCE**

Now comes Appellee, Craig Doyal, by and through undersigned counsel, and certifies that per TEX. R. APP. P. 9.4(i)(2)(B), the Appellee's word count , as verified by the computer program, WordPerfect, is 13,403 (of allowed 15,000) words.

/s/ Naomi Howard

NAOMI HOWARD

## CERTIFICATE OF SERVICE

I hereby certify that, pursuant to TEX. R. APP. P. 9.5(b)(1) and 68.11, an electronic copy of the above and foregoing brief on the merits for Appellee's Petition for Discretionary Review has been electronically served on the prosecutors pro tem for the State and the State Prosecuting Attorney via the electronic filing manager on July 6, 2018.

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